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No. 91-920

IN THE

Supreme Court Of The United States

October Term

JANET L. ROWLAND
and DONALD E. ROWLAND

Petitioners,

v.

DONALD A. PATTERSON, M.D.,
TOM J. ALTIZER, M.D.,
MICHAEL A. WINSLOW, M.D.,
ROBERT K. HOBBS, M.D.,
and ROBERT J. CIRINCIONE, M.D.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Pursuant to Federal Rule of Civil Procedure 56(c), can a court usurp the function of the jury and find as a matter of law that there are no genuine issues of material facts when the inferences to be drawn from those facts depend upon application of the "reasonable person" standard?

2. When a state's highest court has ruled on a point of law, may a federal court rely upon that state's intermediate appellate court decision on the same point of law?

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Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Respondents Donald A. Patterson, M.D., Tom J. Altizer, M.D., Michael A. Winslow, M.D., Robert. K. Hobbs, M.D., Robert J. Cirincione, M.D. respectfully request that this Court deny the Petition for a Writ of Certiorari submitted by Janet L. and Donald E. Rowland seeking review of the unpublished decision of the United States Court of Appeals for the Fourth Circuit in *Rowland v. Patterson*, No. 90-1074 (4th Cir. Aug. 15, 1991) [hereinafter "*Rowland v. Patterson*"].

COUNTERSTATEMENT OF THE CASE

On June 12, 1981, Janet L. Rowland was involved in a two-car collision in Hagerstown, Maryland. Apx. at 222.[1] She sustained multiple injuries in the accident, including an injury to her lower back. Apx. at 225. Shortly after her automobile accident, the Rowlands hired counsel to represent them in connection with their claim of negligence against the driver and owner of the other car. Apx. at 231-35.

In May 1982, Mrs. Rowland sought treatment from Donald A. Patterson, M.D., for the back injury sustained in the June 1981 auto accident. Apx. at 231. After examination and performance of a myelogram, Dr. Patterson advised Mrs. Rowland that surgery would be required to ease her complaints of pain. Apx. at 237-39. Dr. Patterson further advised Mrs. Rowland that she would be out of the hospital within ten days to two weeks following the surgery and that she would be able to return to work within six weeks. Apx. at 240. Based on her preoperative discussions with Dr. Patterson, Mrs. Rowland further expected to emerge from the surgery with no pain in the lower back, no more numbness in her left leg, and no pain in her hip. Apx. at 241. Moreover, based on his preoperative discussions, Mr. Rowland anticipated that his wife's condition after surgery would be normal. Apx. at 442.

On June 3, 1982, Dr. Patterson took Mrs. Rowland to an operating suite at Washington County Hospital where the allegedly negligent surgery was performed. Apx. at 442. On the morning following Dr. Patterson's surgery, Mr. Rowland learned that Dr. Su, a vascular surgeon, was taking his wife back to the operating room for an arteriogram. Apx. at 449-50.

Contrary to Petitioners' assertion in their Statement of the Case that Mrs. Rowland "was never advised that the complications she suffered from were the result of negligently inflicted

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[1] The Appendix to Appellees' Brief filed in the Fourth Circuit is cited "Apx."

injuries to her iliac artery and vena cava,"[2] the Rowlands were, in fact, advised by Dr. Su and Dr. Jack Carey, who performed a third operation, that the complications were the result of Dr. Patterson's operation. Dr. Su stated that Mrs. Rowland's vena cava had been punctured in two places during the surgery performed by Dr. Patterson and that Mrs. Rowland was lucky to be alive. Apx. at 454-56. Mrs. Rowland was paralyzed from the waist down. Apx. at 261. Dr. Carey informed Mrs. Rowland that a major artery had been accidentally cut. Apx. at 331. It is evident from the testimony of Mr. and Mrs. Rowland and from Mrs. Rowland's condition that she was aware shortly after Dr. Patterson's surgery that a mistake had occurred.

Petitioners have also stated that "in their earlier conversations in June of 1982 with the doctors at the Washington County General Hospital [they] were told that the damage and complications suffered by Mrs. Rowland were a result of natural complications of surgery." Petitioners' Petition for a Writ of Certiorari, at 4. As discussed above, this could not be true because the Petitioners were made aware by Drs. Su and Carey that a mistake had occurred during Dr. Patterson's surgery.

As previously stated, counsel had been retained to represent the Petitioners even *before* Dr. Patterson's surgery. Apx. at 418. On July 20, 1983 – one year after Mrs. Rowland's release from the hospital – counsel presented the Rowlands with a document releasing the operator and owner of the car responsible for her accident. At this time, with nearly two years remaining before the statute of limitations would expire, the Petitioners had already formulated an intent to file suit for medical malpractice against the Respondents, an intent of which counsel was fully aware. Apx. at 424.

Despite the fact that Mr. and Mrs. Rowland were represented by counsel; despite the fact that they knew something went wrong during Dr. Patterson's surgery; despite the fact that

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[2] Petitioners' Petition for a Writ of Certiorari, at 3.

they were specifically advised by two different doctors that Dr. Patterson had cut a major blood vessel; despite the fact that Mrs. Rowland was numb from the waist down from the time she awoke from surgery; and despite the fact that this result was totally at odds with what they had been told to expect prior to the surgery, their suit for medical malpractice was not filed until July 16, 1985, more than three years from the date of Dr. Patterson's surgery; more than three years from the date of Dr. Su's consultation and surgery; and more than three years from the date of Dr. Carey's consultation and surgery.

On July 16, 1985, the Petitioners commenced an action for medical negligence against the Respondents, Donald A. Patterson, M.D., Tom J. Altizer, M.D., Michael A. Winslow, M.D., Robert K. Hobbs, M.D., and Robert J. Cirincione, M.D., by filing a claim with the Maryland Health Claims Arbitration Office. After taking discovery, the Respondents moved for summary judgment, alleging that the Petitioners' action was barred by the statute of limitations. On May 6, 1987, the Motion for Summary Judgment was granted. App. C.[3] On May 15, 1987, the Summary Judgment Order was filed with the Health Claims Arbitration Office and an award was entered on behalf of the Respondents.

On June 12, 1987, the Petitioners rejected the award and filed a Notice of Rejection with the Health Claims Arbitration Office. Thereafter, on June 15, 1987, the Petitioners filed two pleadings with the United States District Court for the District of Maryland. The first was entitled "Appeal from and Action to Nullify Finding of Health Claims Arbitration Panel Chairman." The second was a Complaint, virtually identical to the claim for medical negligence initially filed with the Health Claims Arbitration Office.

On July 27, 1987, the Respondents filed a Motion to Dismiss for lack of subject matter jurisdiction, alleging lack of

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[3] The Appendix to the Petition for a Writ of Certiorari is cited herein as "App."

diversity. On October 5, 1987, the District Court granted the Respondents' Motion to Dismiss. App. G. The Petitioners filed a Notice of Appeal on October 16, 1987. On July 18, 1988, the Fourth Circuit affirmed the District Court's dismissal of the action. App. E. Petitioners filed a Petition for Rehearing which was denied on September 6, 1988.

Thereafter, the Fourth Circuit reconsidered Petitioners' Petition for Rehearing, and agreed to rehear the matter *en banc*. On August 10, 1989, the court reversed the District Court's jurisdictional determination and remanded for proceedings consistent with its opinion. App. F.

On April 12, 1990, Respondents Patterson, Altizer, Winslow, and Hobbs moved for summary judgment on the ground that the Complaint was barred by the applicable statute of limitations. On April 17, 1990, Respondent Cirincione filed a Motion to Dismiss or in the Alternative for Summary Judgment, asserting the same grounds set forth by the other Respondents.

On July 16, 1990, United States District Judge Norman P. Ramsey granted the Respondents' Motions for Summary Judgment, holding that the Petitioners' cause of action is barred by the applicable statute of limitations. App. B.

The Petitioners filed an appeal in the United States Court of Appeals for the Fourth Circuit, arguing that the District Court of Maryland erred in its decision to grant the Respondents' Motion for Summary Judgment. The Petitioners contended that the District Court incorrectly determined the date upon which claims of the Petitioners accrued. The Fourth Circuit affirmed the District Court's dismissal of the action on August 15, 1991. App. A. The Petitioners' Petition for Rehearing and Suggestion *En Banc* was denied on September 9, 1991.

REASONS WHY THE PETITION SHOULD BE DENIED

The decision of the Fourth Circuit in *Rowland v. Patterson* does not warrant review by this Court. Supreme Court Rule 10 specifically outlines the considerations governing review on a writ of certiorari. The Petitioners' reasons for granting writ of certiorari do not fall within those considerations; that is, the questions presented do not involve a conflict between Circuit Courts nor do they involve an important question of federal law.

Petitioners' first contention is without merit because it is based on the false premise that federal law controls the determination of when a state claim accrues in a diversity action. Petitioners' argument that there is a "conflict" within the Circuits is also without merit because there is no such "conflict," and even if there were, the argument and authority cited in support thereof are inapplicable in this case. The Petitioners' second argument that the Fourth Circuit failed to rely upon the state's highest ruling is a clear misrepresentation and misinterpretation of Maryland law and, even if true, would not constitute a basis for granting certiorari. Therefore, for these reasons, as discussed in detail below, the Petitioner's Petition for a Writ Certiorari should be denied.

I. PETITIONERS' FIRST CONTENTION IS WITHOUT MERIT BECAUSE IT IS BASED ON THE FALSE PREMISE THAT FEDERAL LAW CONTROLS THE DETERMINATION OF WHEN A STATE CLAIM ACCRUES IN A DIVERSITY ACTION.

In their first question presented, the Petitioners have asked, "Pursuant to Federal Rule of Civil Procedure 56(c), can a court usurp the function of the jury and find as a matter of law that there are no genuine issues of material facts when the inferences to be drawn from those facts depend upon application of the

'reasonable person' standard?" On its face, the question presented does not warrant review by this Court under Supreme Court Rule 10. But, the Petitioners have argued that the United States Courts of Appeals are in "conflict" in the application of the reasonable person standard in determining whether a claim is barred by the statute of limitations.

The Petitioners' first argument is premised on the notion that federal law controls in determining when a state law claim accrues in a diversity action. This clearly is a false statement of the law. Even if there were a "conflict" within the Circuits (which, as is discussed below, is not the case), the Petitioners' first reason for granting certiorari is fatally flawed because of the false premise upon which it is based.

This Court has consistently held that in federal cases where jurisdiction is based on diversity of citizenship, the court must look to state law for a determination of both the applicable statute of limitations and the time at which a state claim accrues. In *Guaranty Trust Co. of New York v. York*, 326 U.S. 99 (1945), the Court held that a New York federal court was bound to apply the relevant state statute of limitations in a diversity action. In applying the "outcome determinative" test, the Court held that "a statute that would completely bar recovery in a suit if brought in a State court bears on a State-created right vitally and not merely formally or negligibly. As to consequences that so intimately affect recovery or non-recovery a federal court in a diversity case should follow State law." *Id.* at 110; *see also Walker v. Armco Steel Corp.*, 446 U.S. 740, 745 (1980). Quoting from Judge Augustus Hand's dissenting opinion in the Second Circuit's decision, the *Guaranty Trust* Court reasoned that:

> [I]t would be a mischievous practice to disregard state statutes of limitation whenever federal courts think that the result of adopting them may be inequitable. Such procedure would promote the choice of United States rather than of state courts in order to gain the

> advantage of different law. The main foundation for the criticism of *Swift v. Tyson* was that a litigant in cases where federal jurisdiction is based only on diverse citizenship may obtain a more favorable decision by suing in the United States courts.

Id. at 111 (quoting *York v. Guaranty Trust Co. of New York*, 143 F.2d 503, 531 (2d Cir. 1944) (Augustus Hand, J., dissenting), *rev'd*, 326 U.S. 99 (1945)). The *Guaranty Trust* Court also noted that even before its decision in *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938), "federal courts relied on statutes of limitations of the States in which they sat. In suits at law State limitations statutes were held to be 'rules of decision' within § 34 of the Judiciary Act of 1789 and as such applied in 'trials at common law.'" *Guaranty Trust*, 326 U.S. at 110-11.

In *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530 (1949), this Court recognized that a federal district court in a diversity action must apply not only the applicable state statute of limitations, but also must follow the state rule regarding when the state cause of action accrues. *Id.* at 532-33. The *Ragan* Court held as follows:

> [I]n the present case we look to local law to find the cause of action on which suit is brought. Since that cause of action is created by local law, the measure of it is to be found only in local law. . . . *It accrues and comes to an end when local law so declares.*

Id. at 533 (emphasis added) (citation omitted). *See also West v. American Tel. & Tel. Co.*, 311 U.S. 223, 238-39 (1940).

Most recently, in *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980), the Court reaffirmed its holdings in *Guaranty Trust* and *Ragan*, and held the following:

> There is simply no reason why, in absence of a controlling federal rule, an action based on state law which concededly would be barred in the state courts

> by the state statute of limitations should proceed through litigation to judgment in federal court solely because of the fortuity that there is diversity of citizenship between the litigants. The policies underlying diversity jurisdiction do not support such a distinction between state and federal plaintiffs, and *Erie* and its progeny do not permit it.

Id. at 753. Thus, each time this Court has considered the issue, the Court has consistently held (1) that the applicable state statute of limitations controls for state law claims in diversity actions and (2) that the state rule regarding when a state claim accrues also governs in diversity actions.

In addition, a survey of United States Courts of Appeals' decisions on point reveals that the Circuit Courts also consistently apply state statutes of limitations and state rules regarding accrual of state claims in diversity actions. For example in *Walko Corp. v. Burger Chef Systems, Inc.* 554 F.2d 1165 (D.C. Cir. 1977), the Court of Appeals for the District of Columbia held:

> The concerns addressed by state legislators and judges with respect to suspensions of a state statute of limitations are similar to those that preoccupy them in the process of determining when a state-created cause of action accrues, or how long the applicable limitation period ought to be. That these latter questions are to be governed by state law is long since settled.

Id. at 1171 (emphasis added) (footnote omitted). *See also Brown v. American Broadcasting Co.*, 704 F.2d 1296, 1299 (4th Cir. 1983) ("With jurisdiction based upon diversity of citizenship, the court must look to Virginia law for a determination of both the applicable statute of limitations and the time at which a claim accrues under the applicable statute."); *Meyers v. Moody*, 693 F.2d 1196, 1206 (5th Cir. 1982) ("State law determines when a state law cause of action accrues . . . .").

In view of this Court's holdings in *Guaranty Trust* and *Ragan*, it is clear that a federal court considering a state law claim in a diversity action is required to apply the applicable state statute of limitations and the state rule for when the state claim accrues. The United States District Court for the District of Maryland did exactly what was required under *Guaranty Trust* and *Ragan*. The District Court applied section 5-109(a)(2) of the Courts and Judicial Proceedings Article of the Maryland Code which reads in relevant part: "An action for damages for an injury arising out of the rendering of or failure to render professional services by a health care provider . . . shall be filed within . . . [t]hree years of the date when the injury was discovered." Md. Cts. & Jud. Proc. Code Ann. § 5-109(a)(2) (1989); App. 5-b. In addition, as is discussed in greater detail below, the District Court also applied the controlling Maryland caselaw with regard to determining when the Maryland statute of limitations period began to run. App. 6-b to 7-b.

The Petitioners have argued in their Petition for a Writ of Certiorari that "it is clear that the circuits are split as to when a case should proceed to a jury when the 'reasonable person' standard is implicated." Petition for a Writ of Certiorari, at 13. Even if this were true,[4] such a "split" would only be relevant to this case if some aspect of federal law had been at issue. Here, however, no aspect of federal law was at issue. Petitioners have not even claimed that federal law was involved in the case *sub judice*.[5] Rather, the issues of what was the applicable statute of

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[4] As is discussed below in Respondents' second reason for not granting certiorari, the Petitioners' claim that there is a "conflict" among the Circuit Courts is inaccurate.

[5] Petitioners confuse the standard for granting motions for summary judgment under Rule 56(c) of the Federal Rules of Civil Procedure with the state law standards for determining whether a party has acted as a reasonable person under the applicable statute of limitations. No case, state or federal, has suggested that motions for summary judgment are inappropriate under proper circumstances where a statute of limitations determination is involved.

limitations and when the cause of action accrued were purely questions of Maryland law. Any such "split" would have been irrelevant to a Maryland state court in considering the applicable statute of limitations and, therefore, any such "split" was irrelevant to the District Court's application of the Maryland statute of limitations to the case *sub judice*.

Since only Maryland law was involved in the case *sub judice*, the Petitioners' first reason for granting writ of certiorari is fatally flawed and, as a result, the Petitioners' Petition for a Writ of Certiorari should be denied.

II. PETITIONERS' ARGUMENT THAT THERE IS A "CONFLICT" WITHIN THE CIRCUITS IS ALSO WITHOUT MERIT BECAUSE THERE IS NO SUCH "CONFLICT," AND EVEN IF THERE WERE, THE ARGUMENT AND AUTHORITY CITED IN SUPPORT THEREOF ARE INAPPLICABLE IN THIS CASE.

The Petitioners argue that there is a "conflict within the United States Courts of Appeals as to when a case should proceed to a jury when the 'reasonable person' standard is implicated." Petitioners' Petition for a Writ of Certiorari, at 13. Petitioners further claim that "[a]lthough no clear test has emerged from any of the circuits, there is a discernable difference among the circuits as to the burden a litigant must bear to survive a motion for summary judgment." *Id.*

The Petitioners' argument that a "conflict" exists rests primarily on a comparison of two cases: *Fries v. Chicago & Northwestern Transp. Co.*, 909 F.2d 1092 (7th Cir. 1990) and *Smith v. States Marine Int'l, Inc.*, 864 F.2d 410 (5th Cir. 1989). Both *Fries* and *Smith* are misplaced. Neither case has any application to the case *sub judice*. Both cases involved federal statutory law claims and questions of when federal claims accrued. The case *sub judice* involved only questions of

Maryland law: (1) what was the Maryland statute of limitations and (2) when did the Maryland claim accrue.

In *Fries*, a machinist brought an action in 1987 under the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60 ("FELA"), seeking monetary damages for job-related hearing loss. The plaintiff had been employed by Chicago & Northwestern Transportation Company ("C & NW") from 1969 to 1987. Both the plaintiff and the plaintiff's wife acknowledged that they had "suspected he had a hearing loss as far back as 1980 and 1981." *Fries*, 909 F.2d at 1094. The District Court granted the employer's motion to dismiss on grounds that the plaintiff's action was time barred by FELA's three-year statute of limitations because the plaintiff knew "the fact of his injury and should have reasonably discovered its cause."

Quoting from this Court's opinion in *United States v. Kubrick*, 444 U.S. 111 (1979), the Seventh Circuit began its analysis in *Fries* by stating the rule that "once a plaintiff is in possession of the critical facts of both injury and governing cause of that injury the action accrues even though he may be unaware that a legal wrong has occurred." *Fries*, 909 F.2d at 1095 (quoting *Kubrick*, 444 U.S. at 122-23). The *Fries* Court went on to hold that "upon experiencing symptoms a plaintiff has a duty to investigate both the injury and any suspect cause," and that "[a]ctual knowledge by the plaintiff of causation is not necessary to find that a cause of action has accrued." *Id.* at 1096. Applying these principles, the *Fries* Court found that the District Court was "clearly reasonable" in determining that "a reasonable person, when confronted with the facts Fries possessed in 1981 about his hearing loss and nature of the injury . . . would have investigated the cause of his injury." *Id.* at 1097.

In *Smith*, a ship engineer brought an action in 1987 under the Jones Act (46 U.S.C. § 688) and general maritime law to recover for job-related hearing loss. Both the Jones Act and general maritime law are governed by a three-year *federal*

statute of limitations. *Smith*, 864 F.2d at 411 (citing 45 U.S.C. §§ 45 U.S.C. 56, 763(a)).[6] The District Court granted summary judgment on behalf of the defendants.

The Fifth Circuit reversed the District Court, holding that "[a] trier of fact might reasonably conclude that Smith did not know the correlation between loud noise and hearing loss, or that Smith reasonably thought he knew already the cause of his ailment." *Id.* at 413. The *Smith* Court based its opinion on three key pieces of evidence: (1) an affidavit by the plaintiff indicating that he was unaware of the cause of his injury and that he thought the problems he was having were attributable to his increasing age and not to his work, (2) uncontradicted medical testimony of the plaintiff's expert witness indicating that "victims who have not been made aware of the correlation between noise exposure and hearing loss do not ordinarily attribute the loss of hearing to their exposure to noise," *id.* at 412 (emphasis omitted), and (3) the testimony of the defendants' own experts acknowledging "that many patients with noise-induced hearing loss do not associate loud noises with hearing problems." *Id.* In light of this evidence, the Fifth Circuit in *Smith* held that the District Court should not have rendered a summary judgment.

Beside the fact that neither *Smith* nor *Fries* has any application to the case *sub judice*, there is no "conflict" between *Fries* and *Smith* because the cases are easily reconcilable. In *Smith*, there was credible medical evidence before the trial court that created a dispute of material facts and, hence, the trial court clearly should not have granted defendants' motion for summary judgment. In *Fries*, on the other hand, there was no dispute as to the material facts. The plaintiff in *Fries* did not present medical evidence to support a dispute of material fact. Thus, the Seventh Circuit properly found that the District Court did not err in its determination that the plaintiff failed in his duty to

[6] Again, the question in the case *sub judice* focuses exclusively on Maryland law. No federal statute of limitations nor federal claim was involved.

investigate in a reasonably diligent manner and, as a result, the District Court properly granted defendants' motion for summary judgment. Therefore, not only are *Fries* and *Smith* irrelevant to the case *sub judice*, they are also not in conflict with one another.

The other cases cited by the Petitioners are misplaced for various reasons.[7] Three of the cases have nothing to do with any state or federal statute of limitations. *See TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 450 n.12 (1976); *Matthews v. Ashland Chem., Inc.*, 703 F.2d 921, 922 (5th Cir. 1983); *Cook v. Baker Equip. Eng'g Co.*, 582 F.2d 862, 865 (4th Cir. 1978). Rather, those cases simply stand for the proposition that summary judgment should generally not be granted in negligence cases because there are usually material facts in dispute. The reasonable person standard in negligence cases is an entirely different matter than the reasonable person test under the discovery rule. Petitioners' argument assumes that these two standards are one in the same. Clearly, this is a misinterpretation of the law on the part of the Petitioners.

In addition, the cases cited by the Petitioners for their theory that "the circuits are inconsistently applying the 'reasonable person' standard can be found in cases alleging securities fraud,"[8] have nothing to do with the case *sub judice*, and any conflict that may have existed in this area of law was

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[7] The three Seventh Circuit opinions the Petitioners cite to support their theory that there is a "conflict" between the Circuit Courts neither have anything to do with the case *sub judice*, nor do they have anything to do with *Fries* or *Smith*. *See Cada v. Baxter Healthcare Corp.*, 920 F.2d 446 (7th Cir. 1990) (considering the accrual of a federal claim under the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq.*), *cert. denied*, 111 S. Ct. 2916 (1991); *Milwaukee Area Vocational Technical & Adult Educ. Dist.* v. U.S. Steel Corp., 847 F.2d 435 (7th Cir. 1988) (considering the accrual of a Wisconsin state law claim); *Kedzierski v. Kedzierski*, 899 F.2d 681 (7th Cir. 1990) (considering the accrual of a Illinois state law claim).

[8] *See Anixter v. Home-Stake Prod. Co.*, 939 F.2d 1420 (10th Cir. 1991); *Smith v. Duff & Phelps, Inc.*, 891 F.2d 1567 (11th Cir. 1990); *Durham v. Business Management Assocs.*, 847 F.2d 1505 (11th Cir. 1988).

recently resolved by this Court. First, because none of these cases concern the issue of when a Maryland cause of action accrues, they have no connection with the case *sub judice*. Second, even if there was a conflict among the Circuits as to whether a state or federal statute of limitations applies in securities fraud actions under Section 10(b) of the Securities Exchange Act of 1934 (15 U.S.C. § 78j(b)) and Rule 10b-5 (17 C.F.R. § 240.10b-5), that conflict was recently resolved by this Court in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 111 S. Ct. 2773 (1991) (holding that private claims under Section 10(b) are governed by the one- and three-year limitations scheme contained in the Securities Exchange Act's express remedial provisions).

In summary, there simply is no "conflict" between the United States Courts of Appeals concerning when a statute of limitations issue goes to the jury. Even if a conflict existed, the conflict would be irrelevant to the case *sub judice* because only questions of Maryland law were at issue. The Fourth Circuit's decision to affirm the District Court's application of Maryland law in this case can in no way be construed to be in conflict with decisions of other United States Courts of Appeals. As a result, the Petitioners' Petition for a Writ of Certiorari does not warrant review by this Court.

III. THE PETITIONERS' ARGUMENT THAT THE FOURTH CIRCUIT DID NOT RELY UPON THE STATE'S HIGHEST COURT RULING IS A CLEAR MISREPRESENTATION AND MISINTERPRETATION OF MARYLAND LAW AND, EVEN IF TRUE, WOULD NOT CONSTITUTE A BASIS FOR GRANTING CERTIORARI.

The Respondents agree fully with the Petitioners that the Supreme Court's decision in *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938), mandates that a federal court sitting in diversity apply the law of the state in which the action arose. Since the

federal courts in this case followed the *Erie* doctrine by correctly applying Maryland law, and since no federal question or conflict is present, Petitioners' Petition for a Writ of Certiorari does not satisfy the considerations governing review on writ of certiorari as provided for by Supreme Court Rule 10.

Even if Petitioners' second reason for granting certiorari satisfied Rule 10's criteria, Petitioner's argument that *Baysinger v. Schmid Products Co.*, 307 Md. 361, 514 A.2d 1 (1986), expressly rejected the Court of Special Appeals' decision in *Lutheran Hospital of Maryland v. Levy*, 60 Md. App. 227, 482 A.2d 23 (1984), *cert. denied*, 302 Md. 288, 497 A.2d 292 (1985), the case relied upon by the District Court and the Fourth Circuit, is invalid. First, the Court of Appeals in *Baysinger* never overruled *Levy*. Moreover, the *Baysinger* court agreed with the basic theory applied in *Levy*, but held that the specific facts were such that reasonable minds could differ and that the parties had concealed the wrong.[9] *Baysinger* does not support Petitioners' claims that the fact finder must determine when a cause of action is discovered or that *Levy* was rejected by the Court of Appeals.

In *Baysinger*, the plaintiff had a Saf-T-Coil intrauterine contraceptive device inserted in May 1979. In November of that year, the device was removed by a physician when the plaintiff began to experience lower abdominal pain. Approximately one month later, the plaintiff was admitted to a hospital and diagnosed as having acute peritonitis with bilateral tubo-ovarian abscesses.

At the time of the plaintiff's hospitalization, she questioned two physicians about the cause of her condition and neither could tell her whether the intrauterine device had caused her illnesses. Four years later, in January 1983, the plaintiff received notice of possible causation through an advertisement in a local newspaper. At that time, the plaintiff retained counsel and filed suit.

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[9] In the instant case, the facts do not support a contention that any concealment of the mistake ever occurred.

The defendant, Schmid Products, filed a motion for summary judgment, arguing that the statute of limitations had expired. The trial court granted the motion and was affirmed by the Court of Special Appeals. The Court of Appeals reversed on the grounds that the undisputed facts could not support a conclusion that the plaintiff had notice of her cause of action as a matter of law at the time she was hospitalized in December of 1979. Significantly, the plaintiff only knew that she had sustained an injury; she did not know the *cause* of her injury. Despite the fact that the plaintiff initiated an investigation into the cause immediately after discovering the injury, she did not know that her complaints were related to the intrauterine device. Thus, *Baysinger* is easily distinguished from the instant case where (1) Petitioners knew of both the unexpected injury and the cause and nonetheless failed to initiate any investigation and (2) no concealment of the wrong occurred. *Id.* at 301, 503 A.2d at 1324. Clearly, under *Levy* and *Baysinger*, summary judgment is appropriate where, as here, reasonable minds could not differ as to when Petitioners discovered their cause of action.

In *Levy*, the facts could lead to no other conclusion than that the claimant actually knew or reasonably should have known of her injury and its cause. The plaintiff broke her ankle on October 25, 1973. She was taken to Lutheran Hospital where her ankle was placed in a cast. Thereafter, a Lutheran Hospital physician advised her to throw away her crutches, get orthopedic shoes, and walk on her ankle. She was discharged by Lutheran Hospital in February 1974. The ankle, however, continued to give her trouble. In April 1974, the plaintiff saw a physician at Mercy Hospital who advised the plaintiff that her ankle "was all messed up" and asked her "Who the hell told you to walk on that ankle?" *Levy*, 60 Md. App. at 233, 482 A.2d at 26. Notwithstanding these comments by the Mercy physician, the plaintiff did not begin to explore the possibility of legal action against the health care provider until 1975 and did not file suit until 1978.

The clear facts of the *Levy* case, according to the Court of Appeals' opinion in *Pennwalt Corp. v. Nasios*, 314 Md. 433, 550 A.2d 1155 (1988), were such that:

> (1) a reasonably prudent person, with knowledge of all the facts and circumstances available to Ms. Levy following her consultation with the physician at Mercy Hospital, would have undertaken further investigation to learn if legal action against the physician from Lutheran was justified;[10] and (2) had Ms. Levy immediately engaged in a reasonably diligent investigation, she would have discovered that she was the victim of negligent medical care.

Id. at 448, 550 A.2d at 1163. In other words, on the facts of *Levy*, the claim was barred by limitations as a matter of law.

In a case decided one year after *Levy*, the Court of Special Appeals of Maryland again considered the application of the discovery rule in a medical malpractice case. *See Stifler v. Weiner*, 62 Md. App. 19, 488 A.2d 192, *cert. denied*, 304 Md. 96, 497 A.2d 819 (1985). In *Stifler*, the plaintiffs, husband and wife, filed a medical malpractice suit on November 25, 1981, against a doctor who had given Mr. Stifler radiotherapy treatment on his upper lip in early November 1978. Mr. Stifler claimed that his tongue was injured as a result of the treatment. Mr. Stifler's deposition testimony revealed that this injury was apparent to him by November 20, 1978. The Court held that Stifler's claim was barred by the statute of limitations. Stifler underwent treatment to his lip and in fact an injury to his tongue occurred. As this was an unexpected result of the treatment, the Court deemed that he obviously knew the injury was a consequence of the treatment. *Id.* at 23, 488 A.2d at 194.

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[10] Significantly, the Court of Special Appeals in deciding *Levy* flatly rejected Ms. Levy's contention that limitations did not begin to run until sometime later when she was told by another physician that malpractice had occurred. *Levy*, 60 Md. App. at 239-40, 482 A.2d at 28.

Maryland law concerning the application of the statute of limitations and the granting of summary judgment is clear. The pertinent statute of limitations in this case is section 5-109(a) of the Courts and Judicial Proceedings Article of the Maryland Code, which provides in relevant part:

> An action for damages for an injury arising out of the rendering of or failure to render professional services by the health care provider, as defined in § 3-2A-01 of this article shall be filed within the earlier of
>
> (1) Five years of the time the injury was committed; or
>
> (2) *Three years of the date when the injury was discovered.*

Md. Cts. & Jud. Proc. Code Ann. § 5-109(a) (1989) (emphasis added). The five-year limitation period is not invoked in this case. However, the three-year limitation period fully applies and, as demonstrated below, acts to bar this claim.

The test for determining when an injury is "discovered" such that the statute begins to run was recently discussed by the Court of Appeals of Maryland in *Pennwalt*. In *Pennwalt v. Nasios*, 314 Md. 433, 550 A.2d 1155 (1988), the Court made clear that a plaintiff's knowledge of a wrong, sufficient to trigger the limitations period, need not be express but may instead be implied. *Pennwalt*, 314 Md. at 447, 550 A.2d at 1162. In defining implied knowledge, the court relied on language from *Poffenberger v. Risser*, 290 Md. 631, 637-38, 431 A.2d 677, 681 (1981), which describes it as "knowledge of circumstances which ought to have put a person of ordinary prudence on inquiry [thus charging the individual] with notice of all facts which such an investigation would have disclosed had it been properly pursued." *Pennwalt*, 314 Md. at 447, 550 A.2d at 1162. The *Pennwalt* Court also noted that under the discovery rule, limitations "begin to run when a plaintiff gains knowledge

sufficient to prompt a reasonable person to inquire further...[and] the beginning of limitations is *not* postponed until the end of an additional period deemed reasonable for making the follow-up investigation." *Id.* at 447-48, 550 A.2d at 1163 (emphasis added) (citing *O'Hara v. Kovens*, 305 Md. 280, 288-89, 503 A.2d 1313, 1317-18 (1986)).

Petitioners further argue that under *Pennwalt*, a cause of action does not begin to accrue until actual knowledge of "wrongdoing" is acquired, in addition to knowledge of an injury and its probable cause. They assert that it was not until Mrs. Rowland's visit to Dr. Ducker in March of 1983 that they knew of any "wrongdoing". Thus, Petitioners contend that the District Court and the Fourth Circuit failed to apply *Pennwalt* and instead held that knowledge of an injury and its cause is all that is required to trigger the running of the limitations period. Petitioners clearly misunderstand not only the holding in *Pennwalt* but also the basis for the Court of Appeals' decision in *Pennwalt*.

Pennwalt focused on a certified question from the United States District Court for the District of Maryland which arose in the context of a product liability case. The question certified to the Court of Appeals was:

> Whether under the discovery rule, knowledge of the manufacturer's wrongdoing or of product defect is required, in addition to knowledge of possible causation, to trigger the statute of limitations in a medical products liability action.

Id. at 435, 550 A.2d at 1156. The Court answered the question posed by the District Court in the following fashion:

> If the District Court used the word knowledge to mean clear and unequivocal proof that a certain manufacturer's negligence produced a defective product causing the plaintiff's injury, then we would

> answer the question no. If use of the term knowledge means express *or implied knowledge* of injury, its probable cause, and probable manufacturer wrongdoing or product defect, then we would answer the question yes.

Id. at 456-57, 550 A.2d at 1167 (emphasis added).

Pennwalt does not depart from the general Maryland rule that either express or implied knowledge of a cause of action will start the running of limitations under the discovery rule. Rather, the *Pennwalt* decision simply applies the requirement of express or implied knowledge of the cause of action in the product liability context.

It is significant that *Pennwalt*, as a products liability action, involves a cause of action where it is not necessary to prove negligence or improper conduct at all. The existence of a defect is all that is necessary to establish culpability, *see, e.g., Phipps v. General Motors Corp.*, 278 Md. 337, 363 A.2d 955 (1976), and if injury is caused by a defect, there is liability. Suspending the accrual of the cause of action until the plaintiff is on inquiry notice of "manufacturer wrongdoing or a product defect" simply means that limitations does not run until the plaintiff obtains knowledge that would cause a reasonable person to begin inquiry which, if pursued to its conclusion, would disclose the existence of these ultimate facts.

Nothing in *Baysinger* abrogates the Court of Appeals' holding in *O'Hara v. Kovens*, 305 Md. 280, 503 A.2d 1313 (1986), that summary judgment on limitations is mandated where the record is such that reasonable men "could not fail to find that the plaintiffs were on notice more than three years before the suit was brought." In *O'Hara*, the Court of Appeals discussed the circumstances in which summary judgment should be granted on a statute of limitations defense. The Court held that where the record is such that reasonable men "could not fail to find that the plaintiffs were on notice more than three

years before suit was brought," summary judgment on the limitations issue is mandated. *Id.* at 301, 503 A.2d at 1324. In this regard, the Court specifically stated that "notice" or "discovery" of an injury is not limited to actual knowledge that a wrong has been committed, and that knowledge of circumstances sufficient to cause a reasonable person to undertake an investigation is all that is required. *Id.* at 302, 503 A.2d at 1324. "Discovery" of an injury or "notice" of an injury means "having knowledge of circumstances which would cause a reasonable person in the position of the plaintiffs to undertake an investigation which, if pursued with reasonable diligence, would have led to knowledge of the alleged [wrong]." *Id.* If the situation is such that the plaintiffs have actual and undisputed knowledge of facts or circumstances which would invariably cause a reasonable person in the position of the plaintiffs to undertake an investigation, then the plaintiffs have "discovered" their cause of action as a matter of law; limitations necessarily run from that point in time and if the prescribed period expires before suit is filed, summary judgment is appropriate.

Applying the well-established rules set forth in *Pennwalt*, *Poffenberger*, *Levy*, *Stifler*, and *O'Hara* to the facts of this case yields a clear result. The Petitioners' cause of action accrued by June 11, 1982. The facts clearly establish that the Petitioners were in possession of information by June 11, 1982 which would have caused reasonable persons in their position to undertake an investigation into the alleged wrong.

Mr. and Mrs. Rowland expected Mrs. Rowland would be "normal" after her June 3, 1982 surgery; that she would emerge from surgery with no back pain, no hip pain and no numbness in her leg; and that she would be out of the hospital within two weeks and back to work in six. By June 11, 1982, Mr. and Mrs. Rowland knew that Mrs. Rowland's condition following surgery was a far cry from what had been anticipated beforehand. Rather than being "normal" and free of pain and

numbness, Mrs. Rowland was in excruciating pain, was numb from the waist down, had no feeling or movement in her feet, had no bowel or bladder control, and had no ability to use her limbs. In short, she awoke from her surgery a paraplegic and her paralysis persisted. Mr. and Mrs. Rowland knew by June 4, 1982, that Dr. Su had performed emergency surgery to repair lacerations of Mrs. Rowland's vena cava that had been sustained during Dr. Patterson's surgery. Moreover, by June 11, 1982, Mr. and Mrs. Rowland knew that she had narrowly escaped death as a result of the lacerations, having been so advised by Dr. Su. Mr. and Mrs. Rowland were told that Dr. Su's surgery had been required as a consequence of Dr. Patterson having cut her vena cava in two places during his surgery the day before. By June 11, 1982, Mr. and Mrs. Rowland were aware that yet another emergency procedure had to be performed on Mrs. Rowland, this time by Dr. Jack Carey. Prior to this surgery, Dr. Carey repeated what Dr. Su had said earlier, i.e. that Janet Rowland's problems were the result of Dr. Patterson having lacerated her blood vessel in his surgery eight days before. By June 11, 1982, Mr. and Mrs. Rowland were not only aware that something had "gone wrong" during Dr. Patterson's surgery, but they were also specifically advised as to what that "something" was. Finally, they were obviously and painfully aware by June 11, 1982 of Mrs. Rowland's paraplegia, a condition very different from the one they had been told to expect preoperatively. There can be no dispute that Petitioners were on inquiry of a potential cause of action by June 11, 1982. No new facts necessary to support the cause of action occurred after that time. All that did occur thereafter was the receipt of Dr. Ducker's opinion that malpractice had occurred. The crucial date for limitation purposes was the date the Petitioners were put on inquiry, not the date they were told by an expert that there had been malpractice. *See Levy*, 60 Md. App. at 240, 482 A.2d at 29.

A reasonably prudent person armed with knowledge of these facts would clearly have undertaken further investigation

to learn if legal action against the Respondents was warranted. Reasonable minds could not differ on this issue. Having been put on notice of these facts by June 11, 1982, the Petitioners, like Ms. Levy, had three years from that time within which to investigate and file their claim for medical malpractice. This is particularly true here, where Janet Rowland was trained and worked in health care facilities as a nursing assistant from 1965 until 1982, and thus had an even greater knowledge of medicine and physiology than the lay individual. *See Jones v. Sugar*, 18 Md. App. 99, 111, 305 A.2d 219 (1973). Under the discovery rule, the three-year limitations period began to run by June 11, 1982. As Petitioners did not file their suit within three years of their discovery of the injury, it is barred under the three-year limitations period of section 5-109(a) of the Courts and Judicial Proceedings Article of the Maryland Code.

Even if Petitioners' obvious misinterpretation of the law was accepted and it was assumed for argument's sake that the law required actual knowledge of possible wrongdoing before a cause of action accrues in a medical malpractice action, it is unquestionably clear that Petitioners indeed did possess such knowledge by mid-June 1982.

There can be no dispute that by June 11, 1982, Petitioners had actual knowledge of circumstances which ought to have put a reasonably prudent person on inquiry of a potential cause of action. The Maryland legislature has determined that three years from that date was a fair and adequate time period for Petitioners to investigate and bring action against the Respondents. The Petitioners had a duty to proceed with their action diligently. They did not.

The Petitioners have clearly lost their privilege to litigate and their action is, therefore, barred as a matter of law. Maryland law states that when reasonable minds could not differ on the question of whether a reasonable person would have initiated an investigation, summary judgment is appropriate. Thus, it is clear

that the District Court and the Fourth Circuit correctly interpreted Maryland law and the Petitioners' argument that the Court failed to do so is without merit.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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